United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17, 983

884

ROBERT A. CUMMINGS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDEX

JOINT APPENDIX

[Filed in Open Court Nov. 13, 1962]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on September 4, 1962

UNITED STATES OF AMERICA,	)	Criminal No. 957-62
	)	
v.	)	Grand Jury No. 1137-62
	)	
ROBERT A. CUMMINGS,	)	Violation: 26 U.S.C. 4744(a)
	)	(Obtaining marihuana without
	)	payment of tax)

[INDICTMENT]

The Grand Jury charges:

On or about October 14, 1962, within the District of Columbia, Robert A. Cummings, being a transferee of marihuana required to pay the transfer tax imposed by Section 4741(a), Title 26, United States Code, obtained about 3,850 milligrams of marihuana without having paid such tax.

/s/ David C. Acheson
Attorney of the United States in
and for the District of Columbia

A TRUE BILL:

/s/ Samuel J. Farming
Dep. Foreman.

[Filed Nov. 16, 1962]

PLEA OF DEFENDANT

On this 16th day of November, 1962, the defendant Robert A. Cummings, appearing in proper person and by his attorney, Gary Bellows, Esquire, being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads not guilty thereto.

The defendant is remanded to the District of Columbia Jail.

By direction of

Matthew F. McGuire
Presiding Judge
Criminal Court #Assignment

* * *

* * *

[Filed Jan. 14, 1963]

[VERDICT]

On this 14th day of January, 1963, came the attorney of the United States; the defendant in proper person and by his attorney Paul E. Miller, Esquire; whereupon the jurors of the regular Petit Jury panel, being called, are sworn upon their voir dire; and thereupon comes a jury of good and lawful persons of the District of Columbia, to-wit:

* * * * *

who are sworn to well and truly try the issue joined herein; the Court directs the calling of one additional person to serve as an alternate juror and James H. Richardson, Jr., being called, is sworn to well and truly try the issue joined herein; whereupon after hearing the instructions of the Court the alternate juror is discharged and the jury retires to deliberate; thereupon the jury returns into Court and upon their oath say that the defendant is guilty as indicted.

The case is referred to the Probation Officer of the Court and the defendant is remanded to the District of Columbia Jail.

By direction of

Henry A. Schweinhaut
Presiding Judge
Criminal Court #6

* * * * * *

[Filed Mar. 4, 1963]

JUDGMENT AND COMMITMENT

On this 1st day of March, 1963 came the attorney for the government and the defendant appeared in person and by counsel, Paul E. Miller, Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of Violation of Section 4744(a), Title 26 U. S. Code as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) Years to Seven (7) Years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Henry A. Schweinhaut
United States District Judge

59

BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT A. CUMMINGS Appellant	)	
vs.	)	No. 17,983
UNITED STATES OF AMERICA Respondent	)	

APPEAL FROM JUDGMENT
OF CONVICTION FOR
UNLAWFUL POSSESSION OF NARCOTICS

Ronald A. Capone
Robert Henri Binder

Attorneys for Petitioner
(Appointed by this Court)

The Farragut Building
Suite 505
900 17th Street, N.W.
Washington 6, D. C.

STATEMENT OF QUESTIONS PRESENTED

The question is whether the Court below was required to direct a verdict of acquittal in a case where the crime is possession of marijuana but the Government failed to submit evidence showing that possession was "knowing."

The question is whether the Court below was required to charge the jury:

That the jury must acquit if they have a reasonable doubt that appellant's alleged possession of marijuana was knowing;

That the jury must acquit if they have a reasonable doubt that the Government's only evidence against appellant was not tampered with during the 30 hours following the arrest that it spent in the arresting officer's personal locker.

The question is whether the Court below was required to tell the jury unequivocally those conditions under which they must find appellant not guilty.

The question is whether appellant was denied substantial justice when the Government prosecutor, in the presence of the jury, offered to appellant's counsel for examination a witness earlier identified as a corroborating witness for the Government but never called by the Government.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT A. CUMMINGS Appellant vs. UNITED STATES OF AMERICA Respondent	)	No. 17,983

BRIEF FOR APPELLANT

INDEX AND TABLE OF CASES

TABLE OF CASES CITED

STATUTES AND RULES CITED

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*Cases or authorities chiefly relied on are marked by asterisks.

JURISDICTIONAL STATEMENT

This Court has jurisdiction of this appeal pursuant to the provisions of Title 28 USC, Section 1291(a) and Rule 41(b) of this Court. Appellant was sentenced by the District Court on March 1, 1963, and his Judgment of Conviction was filed March 4, 1963. His Petition to the District Court for Leave to Appeal in Forma Pauperis was filed on March 11, 1963, and denied on March 12, 1963. His Petition for Leave to Appeal in Forma Pauperis was filed in this Court on March 27, 1963.

STATEMENT OF CASE

The Government's Evidence

About 1:00 a.m. of the morning of October 14th, 1962, (TR 10), Police Officer Palko was walking his beat near the intersection of New York Avenue and 12th Street N.W. when a sailor spoke to him and drew his attention to the appellant and an unidentified man standing together on a corner (TR 34). As the officer walked toward them, the two men began to walk away (TR 12). The officer called to them both, saying, "I want to talk with you" (TR 14) and they both turned around at the same time (TR 32). As the appellant turned around (TR 35), he allegedly reached into his right back pocket, withdrew a black leather pouch (TR 14), threw it in the direction of a trash can (TR 13) and then began to walk toward the officer (TR 32) who was then six feet away from him (TR 14). The pouch hit the trash can and bounced into the street about three feet from the officer (TR 14). The officer then said to the appellant, "Is that yours?" and the appellant answered, "That's not mine" (TR 14-15), whereupon the officer picked up and unzipped the pouch and observed inside what he "believed to be marijuana at the time" (TR 15). This conclusion was based upon his having seen marijuana three or four times before in police school as part of his training there (TR 17). The contents of the pouch allegedly consisted of cigarettes shorter and thinner

than regular cigarettes, closed at both ends, some wrapped on brown and some in white paper, together with what looked like "green fine tobacco" in the bottom of the pouch (TR 15-16).

After picking up the pouch and looking into it, the officer again said, "Is this yours," and the appellant again said "No." (TR 15, 22).

The officer placed the appellant under arrest, took him to the First Precinct Station and charged him. The appellant continued to deny that the pouch belonged to him (TR 23).

At the station, at 1:45 a.m. Sunday morning, the officer placed a telephone call to Detective McKinnon of the Narcotics Squad. McKinnon said that he had no material to perform a "field test" of the material in the pouch, and that Officer Palko should "hold it until Monday morning." (TR 23). Office Palko testified that he then put the pouch and its contents in an envelope (Exhibit 1-A), and put this envelope, not gum-sealed but only string-tied on the back,[2] into his locker.[3] (TR 24).

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[2]There can be little dispute that this envelope, Exhibit 1-A, was not gum-sealed during the thirty-hour period in the locker. Judge Schweinhaut observed that Exhibit 1-A "obviously was not lock-sealed" (TR 28), so that Officer Palko's reference to an envelope which he "sealed in my locker" (TR 27) must refer to his string-tying the envelope on the back (TR 44). As the Internal Revenue Service chemist, Butler, testified, he was given a Treasury Department lock-sealed envelope (Exhibit 1-B) which had within it a police department brown kraft paper string-closure envelope (Exhibit 1-A) which in turn had within it the leather pouch containing the cigarettes (Exhibit 1) (TR 50-51).

[3]At some unidentified time, Officer Palko put his initials

Some thirty hours later, he unlocked the locker, took the envelope to the Narcotics Squad office, (TR 44) and handed it to detective McKinnon at 8:00 a.m. Monday morning, October 15, 1962 (TR 24, 44).

Together, Palko and McKinnon took the pouch and its contents to an Internal Revenue Service chemist. The chemist testified that his analysis of 24 cigarettes showed that they contained 3,850 milligrams net weight of marijuana, and that until the trial he had custody of cigarettes in his safe to which he alone has the combination (TR 52-54).

Eleven days later, on October 26, 1962, two Federal Narcotics Agents "in cooperation" (TR 55) served a demand upon the appellant to produce within eight days a copy of the "order form" which would have authorized the appellant's possession of the marijuana (TR 55-56). Thereafter, one of the agents, who would have received such an order form if it had been submitted to the Internal Revenue Service, (TR 67) heard nothing from the appellant (TR 58).

(Footnote 3 continued)
on each cigarette, on the inside of the leather pouch, and on the inside of the unsealed envelope (TR 25-26).

STATUTES AND RULES INVOLVED

26 U.S.C.A. 4744(a)

"Persons in general. - It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a) --

(1) to acquire or otherwise obtain any marijuana without having paid such tax, or

(2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marijuana so acquired or obtained.

Proof that any person shall have had in his possession any marijuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by Section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a)."

Rule 30, Federal Rules of Criminal Procedure

" * * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

Rule 52(b), Federal Rules of Criminal Procedure

"Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

APPELLANT'S STATEMENT OF POINTS ON APPEAL

1. The Court below erred in failing to direct a verdict of acquittal after the Government failed to submit evidence of guilty intent (i.e., "knowing possession" of marijuana).

2. The Court below erred in failing:

a. To charge the jury that it must acquit if they have reasonable doubt that appellant's alleged possession of marijuana was "knowing."

b. That it must acquit if they have reasonable doubt that the Government's only evidence was not tampered with while in the arresting officer's locker for thirty hours.

c. To tell the jury unequivocally the conditions under which they must find appellant not guilty.

3. The prejudicial invitation by Government counsel to appellant's counsel in the presence of the jury to question the Government's corroborating witness which the Government did not call.

SUMMARY OF ARGUMENT

Knowing Possession of Narcotics was not proved.

Although apparently a matter of first impression here, it has been held elsewhere that the "possession" of narcotics required for conviction under 26 USCA section 4744(a) must be "knowing" possession. Further, it has been held elsewhere that the mere technical possession of narcotics which are thrown away when a police officer shouts is not sufficiently substantial evidence of guilty intent to permit a jury to convict. Rent v. United States, 209 F.2d 893, at 900 (5th Cir. 1954) Since such facts were the sum total of the Government's case against appellant, the court below should have granted the motion for a directed verdict of acquittal.

Defects in the Charge to the Jury Amounted to Substantial Error.

Possibly because trial counsel for appellant was a new employee of the Legal Aid Agency, and perhaps in part because the trial judge had not had this type of narcotics trial before "at all," the jury received a charge which was substantially less than the appellant was entitled to, and to which no objection was made. Nevertheless, these defects in the charge are plain errors affecting substantial rights and should be considered by this Honorable Court in the exercise of its discretion under Rule 52(b), F.R.C.P.

The jury was not told that they must acquit if they had a reasonable doubt that the appellant's alleged possession

of narcotics was "knowing." Although not yet the law in this jurisdiction, it has been held in at least three other circuits that the "possession" required to convict must be "knowing" possession. The rule should be no different here, and the jury should have been so instructed. As already stated, throwing away a cigarette after a policeman shouts in one circuit is as a matter of law not enough to convict for "possession"; surely, in this Circuit, the issue of scienter should have been squarely placed before the jury.

The jury also was not instructed on the issue of possible tampering with the evidence. It is undisputed that the leather pouch containing the cigarettes - the only evidence against appellant - reposed in the arresting officer's locker for thirty hours before it was delivered to a narcotics squad agent for delivery to a chemist. If the jury had decided that it was likely that the contents of the pouch had been switched, the jury was entitled to disregard the evidence, according to a twenty-year old Second Circuit decision. But the charge of the court below did not tell the jury it had this choice.

The jury also was not told, in unequivocal terms, that it must return a verdict of not guilty if it believes from the evidence that the Government has not proved each and every element of the crime beyond a reasonable doubt. Such a charge is required in this Circuit. Williams v. United States, 76 App. D.C. 299, 131 F.2d 21, at 22 (D.C. Cir. 1942). This was a plain error which, under the circumstances

of this case, clearly affected the substantial rights of the appellant.

Prejudicial Invitation to the Defense to Call a Government Witness.

During the course of the trial, a sailor was identified as a witness who could corroborate the arresting officer's story that appellant "threw away" the leather pouch when the officer shouted. Subsequently, after the Government brought the sailor to the courtroom but did not put him on the stand, the prosecutor - in the presence of the jury - audibly offered the sailor to defense counsel for examination!

> "MR. TREANOR: Your Honor, the Government has in court Charles DeCourley of the United States Navy and offers him to Mr. Miller [appellant's counsel] to be called, if Mr. Miller so desires.
>
> "MR. MILLER: I have no desire to call him, Your Honor" (TR 70).

The jury cannot but have viewed this refusal to examine as a belief by defense counsel that the sailor's testimony would be damaging - and this, despite the fact that pretrial investigation had revealed that the sailor had seen nothing! But the prosecutor may not force the defense to audibly accept or refuse examination of a Government witness whom the Government has decided not to call. This clearly prejudiced appellant's rights below and, despite trial counsel's failure to object to this maneuver of the Government prosecutor, such a plain error affecting substantial rights should be noticed now and this cause remanded for a new trial.

ARGUMENT

THE COURT ERRED IN FAILING TO DIRECT A VERDICT OF ACQUITTAL

If all the Government's evidence were accepted as true, still, the only evidence that appellant "possessed" the pouch containing marijuana was the Officer Palko's testimony that, after he approached and called to appellant, appellant withdrew the pouch from his right rear pocket and threw it toward a trash can.

It has been held that the "possession" of narcotics required for conviction must be "knowing" possession. Guevara v. United States, 242 F.2d 745, at 747 (5th Cir. 1957); Accord, Griego v. United States, 298 F.2d 845, at 849 (10th Cir. 1962); Evans v. United States, 257 F.2d 121, at 128 (9th Cir.) cert. denied, 358 U.S. 866 (1958). Of more direct application here, it has also been held that the mere technical "possession" of marijuana plus throwing it away when the police shout is not enough to establish criminal intent (i.e., "knowing possession"):

> "[the possession] was not inconsistent with honest intention or mere curiosity, and his throwing the cigarette away upon being ordered to stop is not, in our opinion, substantial evidence of a guilty knowledge or intent." Rent v. United States, 209 F.2d 893, at 900 (5th Cir. 1954).

Trial counsel's motion for a directed verdict of acquittal was denied by the court below (TR 71). This was error. The Judgment of conviction should be reversed and judgment rendered discharing the appellant.

DEFECTS IN THE CHARGE TO THE JURY

Three errors affecting substantial rights consist of omissions from the charge to the jury. Trial counsel for the appellant made no objection about these omissions prior to the time the jury retired to consider its verdict, as is required by Rule 30 of the Federal Rules of Criminal Procedure. But we believe that the unusual circumstances of this so seriously prejudiced appellant's rights as to require that these errors nevertheless be considered by this Honorable Court.

In this regard, we ask the Court to note that counsel for appellant at the trial was then a new employee of the Legal Aid Agency, that this proved to be the second trial of his career, and that he was required to prepare for at least two trials before Judge Schweinhaut that same morning (TR 3).

Also bearing on the omissions from the charge may be the fact, as stated by the trial judge, that he "had not had a marijuana case for a long, long time, alone, standing alone, and I haven't had this particular one at all." (TR 64).

Given these circumstances, and the overall paucity of evidence against the defendant (the testimony of one police officer who for 30 hours had sole custody of the contents of the leather pouch he said he saw the appellant throw away), we believe this to be a case in which the substantial rights of the appellant have been so prejudiced as to require the re-trial of his alleged

offense, so that a charge adequately encompassing the theories of his defense can be given to the jury.

We respectfully urge this Honorable Court to exercise its discretion and notice the following plain errors affecting substantial rights. F.R. Crim. Proc., Rule 52 (b).

I

FAILURE OF THE COURT TO SPECIFICALLY CHARGE THAT THE JURY MUST ACQUIT IF THEY HAD A REASONABLE DOUBT THAT THE DEFENDANT'S POSSESSION OF MARIJUANA WAS "KNOWING".

Despite the fact that the "possession" of narcotics required for conviction must be "knowing" possession, Guevara v. United States, supra, the charge to the jury made no reference to the requirement that this was an essential element of the crime charged. Indeed, the rambling charge to the jury, where it touched on the issue of possession, had only this to say:

> "Now, one who has possession is called by the statute a transferee, on the theory that someone, by either giving it to him or selling it to him, or bartering it, whatever, - someone transferred it to him by giving it to him or selling it to him, has transferred it to him, so that the fact of possession indicates that he is a transferee because someone had to give it to him somewhere, transfer it to him in order for him to have possession of it.
>
> "Now, maybe he has found it, but that would be a defense.

The possession of it is all that is needed to draw into effect the pertinent statute (TR 79).

* * *

"Now, the Government charges, this defendant had in his possession marijuana, it having been found upon him in the sense that he had it in his possession and then threw it away. That would be constructive possession." (TR 80).

"/S/o that in order to convict this defendant, you must first be convinced beyond a reasonable doubt that he did have in his possession immediately before he threw this away, if he did, marijuana * * * (TR 82).

"/I/f you find that he was in possession, and you do not have a reasonable doubt, of marijuana, then I direct you, as a matter of law, that a tax is required to be paid on marijuana.

"If he did not pay the tax, he will be guilty of a criminal offense.

" * * * /T/he fact of possession creates a presumption that the tax was not paid, if he did not have an order form and produced it on demand (TR 84).

"Now, the only questions of fact for you are these: Did he have in his possession marijuana on this date * * * (TR 85).

As was properly held in Guevara v. United States, supra, "the word 'possession' * * * is so fraught with danger that the

courts must scrutinize its use with all diligence, and the jury must be carefully instructed in order to prevent injustice."

At the very least, the issue of "knowing" possession was an essential issue in the case concerning which the court was required to instruct the jury, whether requested or not. See Tatum v. United States, 88 App.D.C. 386/ at 389, , 190 F.2d 612, at 615 (D.C. Cir. 1951).

II

FAILURE OF THE COURT TO SPECIFICALLY CHARGE THAT THE JURY MUST ACQUIT IF THEY HAD A REASONABLE DOUBT THAT THE LEATHER POUCH AND ITS CONTENTS WERE NOT TAMPERED WITH WHILE IN THE ARRESTING OFFICER'S LOCKER

Officer Palko's testimony reveals that the leather pouch and its crucial contents were left in an ungummed string-closure envelope in his locker from 1:45 a.m. Sunday morning until 8:00 a.m. Monday morning. Whether or not anything happened to the contents of this pouch during this thirty-hour period was an issue for the jury, who were required to decide that the evidence "dispels any inference of the substitution or change of the contents" of the pouch. Cf., United States v. Bailey, 277 F.2d 560, at 565 (7th Cir. 1960). The jury was free to disregard this evidence if they decided it was likely that there had been a switch of the contents. United States v. S. B. Penick & Co., 136 F.2d 413, at 415 (2d Cir. 1943). But the Court's charge did not inform the jury that it could make this choice, and that, if it did make such a judgment, it must acquit the appellant.

The issue of possible tampering with the contents of the pouch was a basic one concerning which the court was required to instruct the jury, whether requested to or not. Tatum v. United States, supra.

III

FAILURE OF THE COURT TO UNEQUIVOCALLY TELL THE JURY THE CONDITIONS UNDER WHICH THEY MUST FIND APPELLANT NOT GUILTY

The court below wholly failed to instruct the jury "at least once, in some unequivocal language, that if it believes from the evidence that defendant is innocent, or if it believes from the evidence that the Government has not proved each and every element of the crime beyond a reasonable doubt, it must return a verdict of not guilty." Williams v. United States, 76 App. D.C. 299 , 131 F.2d 21, at 22 (D.C. Cir. 1942) (Emphasis supplied).

Even a cursory examination of the Court's charge reveals that there was never a reference to the duty of the jury to find the appellant not guilty unless each element of the Government's case were proved.

Thus, the appellant was deprived of even the "once" guaranteed to him by the Williams decision, supra. The appellant should receive a new trial.

PREJUDICIAL REFERENCE TO A KEY GOVERNMENT WITNESS WHOM THE GOVERNMENT NEVER CALLED

The transcript is replete[4] with references to the sailor who first drew Officer Palko's attention to the appellant. As documents in the record relate, appellant's sole contact with this sailor was to offer the sailor a woman. As a consequence, this would seem to be all the sailor could have repeated to Officer Palko in the process of calling Palko's attention to the appellant (TR 5, 10). Furthermore, the Legal Aid Investigator was told by the sailor before trial that the sailor had not seen petitioner throw anything to the ground. Understandably, therefore, the prosecuting attorney stated early in the trial that "[the] sailor * * * will not be a witness in this case" (TR 5).

Despite this disclaimer, however, the prosecuting attorney persisted in asking Officer Palko about his contact and conversation with this sailor - successfully drawing defense counsel into a cross-examination which identified the sailor as a corroborating witness to Officer Palko's story (TR 39-40).

"THE COURT: Was the sailor with you when [the appellant] threw the pouch?

"OFFICER PALKO: He was right behind me.

"MR. MILLER: Did he see the pouch being thrown"

"A. Yes sir, he did.

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[4]Prosecutor's Opening Statement: 2 times (TR 5); Direct Examination of Officer Palko: 8 times (TR 10-11); Cross-examination of Officer Palko: 15 times (TR 31, 37-40); Colloquy: 2 times (TR 69-79).

"Q. He did?

"A. Yes, sir, he did.

"Q. Didn't the sailor tell you at that time that he didn't see any pouch being thrown?

"A. No, sir." (TR 39-40).

Then, with the sailor thus highlighted in the jury's mind, the prosecuting attorney caused the sailor to come to the courtroom, resulting in these highly prejudicial remarks in the presence of the jury:

"MR. TREANOR: The Government rests, Your Honor, although the Government finds itself in a position--

"THE COURT: You cannot rest yet. I guess we are halted at this point.

"Ladies and gentlemen, the Government has called the sailor who has been referred to in the testimony here.

"We cannot proceed further without his presence because the defense then can put on its case, if any.

* * *

"MR. TREANOR: Your Honor, the Government has in court Charles DeCourley of the United States Navy and offers him to Mr. Miller [defendant's counsel] to be called, if Mr. Miller so desires.

"MR. MILLER: I have no desire to call him, Your Honor.

"THE COURT: There is no use keeping him here.

"MR. TREANOR: No, Your Honor.

"THE COURT: Is he in the witness room"

"MR. TREANOR: No, he is here, Your Honor.

"THE COURT: What is his name?

"MR. TREANOR: DeCourley.

"THE COURT: Mr. DeCourley, I am sorry to bring you here, but we find that you cannot tell us anything that is admissible.

It was too late to stop your trip here, so you can go back." (TR 69-70).

We respectfully submit that this audible offer of the sailor to the defense counsel for purposes of being a witness for the defense was prejudicial error because it followed testimony which identified the sailor as the only witness who could corroborate Officer Palko's testimony that the appellant had physical possession of the pouch.

With this testimony in the record, the prosecuting attorney was not free to audibly offer the sailor to the defense for examination. This was tantamount to a challenge to the defense to call the Government's corroborating witness, a challenge which the defense could decline only at its peril. The jury must have viewed defense counsel's refusal to examine the sailor as a clear indication that the sailor's testimony would be damaging, even though pre-trial investigation revealed that the sailor had not seen petitioner throw away the pouch.

Despite the failure of counsel for appellant to object to

this shocking development at the trial, this plain error should be noticed now, F.R. Crim. Proc. Rule 52(b), and this cause remanded for a new trial.

CONCLUSION

For the reasons stated above, the judgment of conviction should be reversed and judgment rendered discharging the appellant, or this cause should be remanded for a new trial.

Respectfully submitted,

Ronald A. Capone

Robert Henri Binder

(Attorneys for Petitioner
(Appointed by this Court)
The Farragut Building
900 17th Street, N.W.
Washington 6, D. C.

CERTIFICATE OF SERVICE

This will certify that I have this 6th day of August, 1963, served the attached Brief for Appellant upon the respondent by mailing same, first-class postage prepaid, to the United States Attorney, United States Courthouse, Washington 1, D. C.

Robert Henri Binder
Attorney for Petitioner

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17983

ROBERT A. CUMMINGS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
JOHN H. TREANOR, Jr.,
SYLVIA BACON,
Assistant United States Attorneys.

QUESTIONS PRESENTED

1. Where the evidence shows that appellant removed a pouch containing marihuana from his pocket and threw it away as a police officer approached him, is there sufficient evidence of "knowing possession" to sustain a jury verdict of guilty under the Narcotic Control Act of 1956, 70 Stat. 567, 26 U.S.C.A. 4744(a)?

2. Where neither request for instructions nor objection to instructions was made and where all alleged omissions in the instructions to the jury were substantially covered, may appellant complain on appeal of omissions in the instructions to the jury?

3. Where a witness referred to by both counsel is proffered in the presence of the jury without objection and is excused as having no admissible testimony, is there plain error affecting substantial rights?

699-990--63——1

INDEX

TABLE OF CASES

*Cases chiefly relied upon.

OTHER REFERENCES

*Cases chiefly relied upon.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17983

ROBERT A. CUMMINGS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Robert A. Cummings, appellant, was indicted on November 13, 1962 under 26 U.S.C. 4744(a) for obtaining marihuana without payment of the transfer tax. He entered a plea of not guilty and on January 14, 1963 a jury found him guilty as charged. By judgment and commitment filed on March 4, 1963 he was sentenced to a term of 2 to 7 years imprisonment.

Evidence

The only evidence offered at trial was introduced by the United States. Defendant did not testify and did not offer any other evidence.

The first witness for the United States was Officer John J. Palko, Metropolitan Police Department. He observed appellant while walking his beat at approximately 1:00 a.m. on October 14, 1962 (Tr. 9–10). He started walking toward appellant and called to him (Tr. 11, 13, 14). Appellant turned around, reached into the right rear pocket of the trousers which

he was wearing, withdrew a pouch and threw it in the direction of a trash can (Tr. 13). The officer recovered the pouch which had hit the trash can and bounced into the street (Tr. 14–15). Appellant denied that the pouch was his (Tr. 14–15). The officer ascertained that the pouch contained what he believed to be marihuana, i.e., short, thin cigarettes closed at both ends, wrapped in brown and white papers (Tr. 15–16). Appellant was placed under arrest.

Due to lack of material with which to perform a "field test" on the marihuana, the pouch and its contents were placed in an envelope in Officer Palko's locker until the next day (Tr. 23–24). Each cigarette, the leather pouch and the envelope were initialed by the officer (Tr. 25–26). The locker was locked; it was unlocked when the pouch was removed (Tr. 24).

Three other witnesses testified for the United States. Witness McKinnon stated that he received the pouch from Officer Palko. His description of the pouch and its contents matched Officer Palko's statement of what he put in his locker (Tr. 44). Witness William P. Butler, a qualified chemist, testified that he analyzed the contents of an envelope given him by Witness McKinnon and found 3850 milligrams of marihuana in 24 cigarettes (Tr. 51–52). Witness Wilbur B. Jones stated that he made the statutory demand to appellant to produce an order form for marihuana and no order form was produced (Tr. 57–58).

Proffer of Witness

During the course of testimony by Officer Palko, it appeared that a sailor, Charles DeCourley, was at the scene on October 14, 1962. His presence was the subject of questions by both counsel and the court (Tr. 10–11, and 37–40).

Court was adjourned while the Government sought the witness. Then at the close of its case, the United States proffered witness Charles DeCourley. Defense counsel announced that he did not desire to call witness DeCourley (Tr. 70). The court stated (Tr. 70):

> Mr. DeCourley, I am sorry to bring you here but we find that you cannot tell us anything that is admissible.

No objection was made to this proffer. No motion for mistrial was made.

Instructions

The court instructed the jury with respect to presumption of innocence (Tr. 73), burden of proof (Tr. 73), reasonable doubt (Tr. 73–74), credibility of witnesses (Tr. 75) and weight of evidence (Tr. 76).

The court also charged the jury in the terms of the statute (Tr. 80) and generally discussed possession of marihuana (Tr. 79). The court itemized the findings which the jury would have to make beyond a reasonable doubt in order to convict the defedant (Tr. 82). The jury was instructed that in order to convict it would have to find beyond a reasonable doubt that defendant had marihuana in his possession (Tr. 82) and that possession of marihuana was a question of fact for them (Tr. 85).

The only objection to the charge concerned the instruction on payment of the tax (Tr. 83). No requests for additional instructions were made.

STATUTES AND RULES

Narcotic Control Act of 1956, 70 Stat. 567, 26 U.S.C.A. 4744 (a) provides:

> (a) PERSONS IN GENERAL. It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a)—
>
> (1) to acquire or otherwise obtain any marihuana without having paid such tax, or
>
> (2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.
>
> Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a).

Rule 29(a), Federal Rules of Criminal Procedure provides:

> (a) MOTION FOR JUDGMENT OF ACQUITTAL. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The Court on motion of a defendant or on its own motion shall order the entry of judgment of acquittal on one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. * * *

Rule 30, Federal Rules of Criminal Procedure provides:

> * * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

Rule 52(b), Federal Rules of Criminal Procedure provides:

> (b) PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

SUMMARY OF ARGUMENT

I

The evidence at trial showed that appellant had knowing possession of marihuana. At the approach of a police officer, he removed a tobacco pouch containing 24 marihuana cigarettes from his rear pocket and threw the pouch toward a trash can. This evidence, plus failure to produce the requisite order form, sustains a verdict of guilty under the Narcotic Control Act of 1956, 70 Stat. 567, 26 U.S.C.A. 4744(a).

II

Considered as a whole the instructions to the jury were correct. The jury was instructed on possession, weight and sufficiency of the evidence, and the circumstances in which a verdict of not guilty could be returned. In the absence of objection at trial, these instructions should not be reviewed on appeal. They do not constitute error affecting substantial

rights. Rules 30 and 52(b), Federal Rules of Criminal Procedure.

III

The proffer of a witness in the presence of the jury was an appropriate trial procedure. Absent objection and motion for mistrial, the proffer should not be reviewed by this Court. There were no factual circumstances in this proffer which constitute prejudice affecting substantial rights.

ARGUMENT

I. The evidence was sufficient to sustain the verdict

Appellant contends that knowing possession of marihuana was not proved and that he was, therefore, entitled to a judgment of acquittal. Neither the facts nor the law support his contention.

The evidence showed that appellant exercised exclusive control and dominion over a pouch containing marihuana. He removed the pouch from his own rear pocket and threw it toward a trash can when approached by a police officer (Tr. 13–14). Officer Palko gave direct evidence (Tr. 13):

> When I called to him [appellant], he turned around and started toward me. At that time he reached in his rear pocket, pulled out a pouch, a black leather pouch, and he threw it to the ground.

The pouch contained 24 marihuana cigarettes (Tr. 52–54). The evidence was not contradicted. No explanation of possession was made.

This is "knowing possession." Appellant's effort to dispose of the pouch when approached by the police officer is compelling evidence of his knowledge of its contents. Abandonment or attempted destruction of the incriminating evidence gives rise to a presumption of guilty knowledge to be dealt with by the jury. *Cf., Wilson* v. *United States*, 162 U.S. 613, 621 (1896); *Rivers* v. *United States*, 270 F. 2d 435, 438 (9th Cir. 1959), *cert. denied*, 362 U.S. 920 (1960). Further, evidence showing exclusive control and dominion over property is "a potent circumstance tending to prove knowledge of the pres-

ence of narcotics." *Evans* v. *United States*, 257 F. 2d 121, 128 (9th Cir. 1958), *cert. denied*, 358 U.S. 866, *reh. denied*, 358 U.S. 901. Even the most brief "fleeing" possession of marihuana is sufficient evidence of guilty knowledge or intent. *Miller* v. *United States*, 273 F. 2d 279, 282 (5th Cir. 1959), *cert. denied*, 362 U.S. 928.[1]

The facts proved in this case were sufficient to sustain the verdict of guilty as charged. *Compare: Curtis* v. *United States*, 297 F. 2d 639 (5th Cir. 1961), *Miller, supra, Evans, supra, Associated Investment Co.* v. *United States*, 220 F. 2d 885 (5th Cir. 1955), and *Wilson* v. *United States*, 218 F. 2d 754 (10th Cir. 1955). They are distinguishable from the facts in the cases upon which appellant relies. In *Guevara* v. *United States*, 242 F. 2d 745 (5th Cir. 1957), the marihuana was found under the front seat of a car to which many persons had access. *Guevara* did not involve exclusive, unexplained possession. In *Rent* v. *United States*, 209 F. 2d 893 (5th Cir. 1954) the facts showed possession of a single marihuana cigarette in circumstances showing curiosity rather than guilty knowledge.

In this case the evidence showed actual possession of a substantial quantity of marihuana in circumstances connoting guilty knowledge. Assuming the truth of all the evidence and drawing the reasonable inferences, there was ample evidence from which a reasonable mind could fairly believe without reasonable doubt that appellant knowingly possessed marihuana. The trial court, therefore, properly denied the motion for judgment of acquittal. Rule 29(a), Federal Rules of Criminal Procedure and *Curley* v. *United States*, 81 U.S. App. D.C. 389, 392, 160 F. 2d 229, 232 (1947), *cert. denied*, 331 U.S. 837. The verdict of the jury should be sustained. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942).

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[1] The principle of law discussed herein has frequently been applied in this jurisdiction although there is no appellate discussion of its application to cases involving possession of marihuana. Knowledge and intent are rarely susceptible to direct proof and may be inferred from possession and surrounding circumstances. *Bray* v. *United States*, 113 U.S. App. D.C. 136, 306 F. 2d 743–746 (1962) and *Baer* v. *United States*, 54 App. D.C. 24, 26, 293 Fed. 843, 845 (1923).

II. The instructions to the jury were correct

Appellant alleges 3 omissions in the instructions to the jury. None of these omissions was brought to the attention of the trial court either by objection or by request for instruction.

Failure to object to the charge as given before the jury retires precludes assigning error in this Court for an omission in the instruction. Rule 30, Federal Rules of Criminal Procedure. *Duke* v. *United States*, 107 U.S. App. D.C. 382, 278 F. 2d 262 (1960). *Ruffin* v. *United States*, 106 U.S. App. D.C. 97, 269 F. 2d 544 (1959), *cert. denied*, 361 U.S. 865. *Moore* v. *United States*, 104 U.S. App. D.C. 327, 262 F. 2d 216 (1958). *Pitts* v. *United States*, 99 U.S. App. D.C. 63, 237 F. 2d 217 (1956). *Wyche* v. *United States*, 90 U.S. App. D.C. 67, 193 F. 2d 703 (1951), *cert. denied*, 342 U.S. 943. *Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F. 2d 261 (1950).

This Court need not consider the contentions of the appellant. All of the alleged omissions were covered in substance by the instruction. None of the alleged omissions requires an exercise of discretionary authority under Rule 52(b), Federal Rules of Criminal Procedure.

a. Instruction on possession

Defendant received a favorable instruction on elements of the offense, including possession, in the terms of the statute (Tr. 80–82). An instruction in the terms of the statute is a sufficient instruction. *Wheeler* v. *United States*, 89 U.S. App. D.C. 143, 190 F. 2d 633 (1951).

The use of the word possession in the statute is clear. The numerous references of the court to the circumstances of possession fully apprised the jury of what it was to do. In order to convict, the jury was told that it had to be convinced beyond a reasonable doubt that appellant had possession immediately before he threw the marihuana away. (Tr. 82). This was in contrast to possession which might have arisen from finding the marihuana or from constructive possession of it (Tr. 79–80). The instruction on possession was a correct statement of the law.

Further, considered as a whole, the instruction on possession was favorable to defendant. It did not contain reference to

the inferences of guilt which could reasonably be drawn from the circumstances surrounding possession. Argument I, *supra*, pp. 5–6. Appellant should not be heard to complain of a favorable instruction.

b. Instruction on possible tampering

The court instructed the jury on its function and duty in passing on the credibility of witnesses and weighing the evidence. Detailed instruction from the court on each item of evidence was not necessary. *Charles M. Jones* v. *United States*, 113 U.S. App. D.C. 233, 307 F. 2d 190 (1962), *Obery* v. *United States*, 95 U.S. App. D.C 28, 217 F 2d 860 (1954) and *Barsky* v. *United States*, 83 U.S. App. D.C. 127, 138, 167 F. 2d 241, 252 (1948), *cert. denied*, 334 U.S. 843, *reh. denied*, 339 U.S. 971.

Moreover, the facts in this case would not support an instruction on tampering with the evidence. The testimony of officer Palko showed that he placed the marihuana in his locked locker. He unlocked his locker to remove it (Tr. 24). The evidence which he initialed and placed in his locker matched the evidence which Detective McKinnon received from him. (Tr. 25–26 and Tr. 44).

c. Instruction on verdict of not guilty

The instruction to the jury made amply clear the circumstaces in which defendant might be found not guilty. As to presumption of innocence the court stated (Tr. 73):

> * * * the law presumes him to be innocent of this charge, and that *presumption of law is sufficient to acquit him* * * * [Emphasis added.]

The instruction on reasonable doubt and burden of proof set forth circumstances for a verdict of not guilty in detail (Tr. 73–75). Finally, the last paragraphs of the charge showed the precise circumstances for a not guilty verdict (Tr. 82):

> * * * so that in order to convict this defendant, you must first be convinced beyond a reasonable doubt that he did have in his possession immediately before he

threw this away, if he did, marihuana, and two, that a tax was required to be paid on that:

Thirdly, you have to find beyond a reasonable doubt that he didn't pay the tax * * *

This case is similar to *Ruffin* v. *United States, supra,* p. 7. Therein the court was asked for an instruction on "equal hypothesis of guilt or innocence." The court said it would "cover the idea" "which in effect was done in court's instruction on burden of proof and reasonable doubt." Instructions which cover the essential idea meet the standard of *Williams* v. *United States,* 76 App. D.C. 299, 131 F. 2d 21 (1942).

III. The proffer of witness DeCourley did not require *sua sponte* declaration of a mistrial

Appellant contends that the proffer of a witness in the presence of the jury was prejudicial error. No objection was made. No mistrial was asked.

The proffer of a witness at trial is an appropriate procedure. It avoids the calling of cumulative witnesses. It forecloses argument concerning missing witnesses and lack of corroboration. Appellant suggests no case law holding that proffer of a witness in the presence of the jury is prejudicial.

Further it is axiomatic that any claim of misconduct on the part of the prosecution must be made promptly. *Lorenz* v. *United States,* 24 App. D.C. 337, 390, *cert. denied,* 196 U.S. 640 (1904) and *Alberty* v. *United States,* 91 F. 2d 461, 463–464 (9th Cir. 1937). Although formal exceptions have been abolished, failure to object at trial waives the objection. Rule 51, Federal Rules of Criminal Procedure and *Haskins* v. *United States,* 82 U.S. App. D.C. 330, 163 F. 2d 766 (1947).

Finally it should be noted that on the facts of this case no prejudice affecting substantial rights occurred. The testimony showed that the witness DeCourley was at the scene but never stated that he saw the pouch thrown. Officer Palko testified in response to such inquiry as follows (Tr. 40):

Q. Did he tell you that [he saw the pouch thrown]?
A. No.

In addition the trial court dispelled any inference which might have been drawn concerning the potential testimony of DeCourley when the witness was excused (Tr. 70):

> The COURT. Mr. DeCourley, I am sorry to bring you here, but we find that you cannot tell us anything that is admissible.

In light of the evidence and the remark of the court, the jury could not infer that the testimony of DeCourley would be damaging to defendant.

What occurred in this case was an appropriate trial procedure. A witness was proffered. Opposing counsel for reasons known to himself elected not to call the proffered witness. For other reasons known to himself he made no objections to the proffer, if indeed it was objectionable. He chose to proceed with the case to the jury and made no motion for mistrial. This trial strategy should not be set aside by the trial court or this Court. *Lorenz* v. *United States, supra* at 391.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment of the District Court for the District of Columbia be affirmed.

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